

EXHIBIT A

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T1000 - In re NFL Concussion
No. 14-8103

1 JUDGE THOMAS AMBRO: We have one matter
2 this afternoon and that is In Re National
3 Football League Players Concussion Injury
4 Litigation, Number 14-8103. Mr. Molo, Mr.
5 Car...or Professor Issacharoff and Mr. Birenboim,
6 whenever you're ready.

7 STEVEN MOLO: May it please the Court,
8 my name is Steven Molo and I represent the
9 Petitioners, seven former players in the NFL, who
10 are objecting to the class action settlement.

11 JUDGE THOMAS AMBRO: Do you wish to
12 reserve any time for rebuttal?

13 STEVEN MOLO: I would like to reserve
14 five minutes of time for rebuttal.

15 JUDGE THOMAS AMBRO: That's fine. There
16 are essentially two questions. One that we've
17 asked you whether we have the authority or
18 discretion--

19 STEVEN MOLO: I know.

20 JUDGE THOMAS AMBRO: --to hear an appeal
21 under Rule 23(f) and whether if so, we should do
22 so. So let's begin with the first one, whether we
23 have the authority to hear--

24 STEVEN MOLO: So--

25 JUDGE THOMAS AMBRO: --this appeal.

1 JUDGE D. BROOKS SMITH: Of this order.

2 JUDGE THOMAS AMBRO: Of this order--

3 STEVEN MOLO: Of this order.

4 JUDGE THOMAS AMBRO: --the July 7th
5 order.

6 STEVEN MOLO: This court has the
7 authority to fix this because 23(f) says, "A
8 court of appeals may permit an appeal from an
9 order granting or denying class certification."

10 JUDGE D. BROOKS SMITH: So what this had
11 to be was an order granting or denying class
12 action certification?

13 STEVEN MOLO: That is correct, Judge
14 Smith, because--

15 JUDGE D. BROOKS SMITH: How is it then?

16 STEVEN MOLO: Because Rule 23 only has
17 one provision that says you're either granting a
18 class certification, or you're not. There's no
19 intermediate step that can be taken. And for the
20 court here, the court did two things. One, she
21 certified a class. And second, she preliminarily--
22 -

23 JUDGE D. BROOKS SMITH: How do you
24 certify a class and then set a date for the
25 certification of a class at a later time?

1 STEVEN MOLO: No, there wasn't a date
2 for certification of class. There was a date set
3 for a fairness hearing on whether or not the
4 settlement was fair, adequate and reasonable.

5 JUDGE D. BROOKS SMITH: What did she say
6 earlier in her order relative to certification?

7 JUDGE KENT A. JORDAN: Yeah, I thought
8 she stated quote "At the preliminary approval
9 stage, a court may conditionally certify the
10 class for purpose of providing notice, leaving
11 the final certification decision for the
12 subsequent fairness hearing." That's on page 12
13 of her July 7th--

14 JUDGE THOMAS AMBRO: Seventh.

15 JUDGE KENT A. JORDAN: --memorandum
16 Opinion. So, Judge Brody clearly thought she was
17 not certifying the class; that she was only
18 giving a preliminary ruling for purposes of
19 providing notice and that she was "leaving final
20 certification" for a later point.

21 JUDGE D. BROOKS SMITH: And that's what
22 this all about, notice, right?

23 STEVEN MOLO: Well, no, it's kind of
24 about notice.

25 JUDGE D. BROOKS SMITH: It's not

1 certification. It's about notice.

2 STEVEN MOLO: It's about certifying a
3 class and setting the rights--if I could just
4 step back for one second, Judge Smith. This
5 particular circumstance, all right, involves a
6 class of about 20,000 individuals who are
7 injured. We're not talking about insurance
8 policies. We're not talking about defects in
9 automobiles. We're not talking about how a bank
10 statement should've been written. We're talking
11 about injured individuals. The parties came
12 before the court and they said we've reached
13 settlement. We've met the requirements of Rule
14 23. They'd gone through, they filed a petition
15 that sets forth how they have met those
16 requirements and the Judge did say--that's
17 exactly right, Judge Jordan, the judge did say
18 preliminarily and conditionally upon settlement,
19 but Rule 23 eliminated the conditional class
20 action settlement in the 2003 Amendments. And the
21 Rule explicitly says--

22 JUDGE D. BROOKS SMITH: So there is no
23 such thing as a conditional--

24 STEVEN MOLO: There is no such thing as
25 conditional settlement.

1 JUDGE D. BROOKS SMITH: Well, doesn't
2 that actually work to your disadvantage by
3 suggesting this is all simply about setting up
4 notice to the class for purposes of the fairness
5 hearing?

6 STEVEN MOLO: That's not correct.

7 JUDGE D. BROOKS SMITH: She can't
8 conditionally approve.

9 STEVEN MOLO: Well, she stated that the
10 --she stated that the class was certified, so--

11 JUDGE KENT A. JORDAN: Well, that's not
12 quite right. She stated it was conditionally
13 certified, so the question is if she--since it
14 appears clear that what she was trying to do and
15 it was, and in fact expressly said was, I'm not
16 finally certifying the class. That's for a later
17 date. That if she couldn't conditionally certify
18 it for purposes of notice, and we can't view it
19 that way, isn't it in keeping with the express
20 intent of her order to say she did something--she
21 did something to provide a framework for notice,
22 but whatever it was she did, it wasn't a class
23 certification because she stated her intent to do
24 that later.

25 STEVEN MOLO: Well, first of all, the

1 2000 Amendments and the Advisory Committee's
2 Notes say "a court that is not satisfied with the
3 requirements of Rule 23 are met, should review
4 certification until they are met." And so, the
5 court didn't do that. The court didn't say I've
6 been presented with arguments and a petition by
7 the parties--

8 JUDGE KENT A. JORDAN: No, no, what she
9 said was, I'm going to do this later. I'm going
10 to have a hearing on a later date and that's when
11 I'm going to decide on certification and on the
12 fairness.

13 STEVEN MOLO: Here's why that doesn't
14 work though because in the meantime all of those
15 class members' rights are being determined. She
16 decided who would represent the absent class
17 members. She determined their rights in setting
18 forth procedures and timelines for them to
19 follow.

20 JUDGE D. BROOKS SMITH: Doing so in a
21 manner whereby you and any other objector, could
22 shoot at that at the subsequent fairness hearing.

23 STEVEN MOLO: But--

24 JUDGE D. BROOKS SMITH: You want two
25 bites at the apple, don't you?

1 STEVEN MOLO: No, I actually want one
2 bite at the apple. And I'll tell you why I want
3 one bite at the apple, Judge Smith, because 23(f)
4 was designed for this very reason. We have a
5 situation where the class certification error is
6 grossly erroneous.

7 JUDGE D. BROOKS SMITH: No, no, 20--
8 that's not what [UNINTEL PHRASE] by 23(f).

9 JUDGE THOMAS AMBRO: 23(f) was designed
10 for two purposes. One, if you deny class
11 certification and it becomes the "death nail" to
12 plaintiffs because they don't have big enough
13 claims to really litigate them on their own, or
14 flip it. If you grant class certification,
15 usually conditionally, but what that means is it
16 puts quote "hydraulic pressure"--

17 STEVEN MOLO: Correct.

18 JUDGE D. BROOKS SMITH: --close quote on
19 defendants to settle rather than going to trial.
20 So the idea was, hey, let's see if we can get
21 this out of the way sooner as opposed to later--

22 JUDGE D. BROOKS SMITH: Final judgment
23 is too late. That's what [UNINTEL] realized.

24 JUDGE THOMAS AMBRO: That's exactly,
25 exactly.

1 STEVEN MOLO: That's correct. And there
2 were--

3 JUDGE KENT A. JORDAN: Well, here--

4 STEVEN MOLO: --two examples that were
5 given.

6 JUDGE KENT A. JORDAN: No, those aren't
7 just two examples. That's the only--those are the
8 only purposes for 23(f), right?

9 STEVEN MOLO: That's not correct, Judge
10 Jordan. The Rule does not say those are the only
11 purposes. The Rule says that this court can, in
12 its unfettered discretion exercise--

13 JUDGE D. BROOKS SMITH: But those are
14 the principal reasons why you have a 23--

15 STEVEN MOLO: Those are the principal
16 reasons, all right? I wouldn't disagree those
17 are the principal reasons. But what we have here,
18 Judge Smith, what the rule was designed for and
19 what those reasons are furthered by at earlier
20 review, is that the parties shouldn't have to
21 waste the time, the money, the expense, the
22 effort to go through a litigation. And the two
23 circumstances, Judge--

24 JUDGE D. BROOKS SMITH: And how is this
25 not an invitation to an exquisite example of such

1 waste when we are being asked to review something
2 that even the district court has not yet had an
3 opportunity to examine in depth, but which, at a
4 later date already set by the district court, she
5 will have such opportunity. You're asking us to
6 review a record that is barren of the kind of
7 facts that even a district court should have for
8 purposes of ruling on both certification and
9 approval of the settlement.

10 STEVEN MOLO: On the certification
11 issues and on the approval of settlement, Judge
12 Smith, this Court has said that you can look at
13 the face of the agreement in G.M. Trucks, in
14 Dewey v. Volkswagen; you need not look beyond
15 that where there is a significant conflict. And
16 the conflict here was raised before the district
17 court twice. It was raised in the Petition to
18 Intervene. The Judge had the opportunity to rule
19 that it's laid out in those papers very clearly.
20 And the conflicts were also laid out in an
21 objection to the Motion for Preliminary Approval
22 of Class Certification--

23 JUDGE KENT A. JORDAN: But assume that's
24 true--

25 STEVEN MOLO: --so the district court

1 had two opportunities to address this and chose
2 not to do so.

3 JUDGE KENT A. JORDAN: If that's true,
4 Mr. Molo, why isn't the right thing for us to do
5 to let her examine them at the time she planned
6 to examine them in a final way? Why--your
7 opponents say in their filings, the objectors are
8 coming in here when they're going to have their
9 full fair opportunity to go with this within a
10 matter of a matter of a very few months. And I -
11 and that did prompt in my mind the question, why
12 now? Why do you want to do this right now, on
13 this record, instead of waiting until she gives
14 what, in her mind, is the final certification and
15 then saying, okay, take it up at that point?

16 STEVEN MOLO: Because for three reasons.
17 First, the district court has had an opportunity
18 to address these issues twice and has chosen not.
19 Whatever conclusion we want to draw from that,
20 the issue was brought before the judge quite
21 clearly and she did not address the second
22 [PART?].

23 JUDGE D. BROOKS SMITH: How--just for
24 detail and for my understanding, how was that
25 done and through what extent of process was it

1 done?

2 STEVEN MOLO: There was a detailed
3 Motion for Leave to Intervene--Petition for Leave
4 to Intervene filed with the district court while
5 the settlement agreement was being renegotiated
6 between the time that the judge, sua sponte, said
7 I'm not going to allow it and there was a five-
8 month gap, there was a Motion for Leave to
9 Intervene. Within a week of the Motion for
10 Preliminary Approval for Class Certification,
11 there was a 48-page objection or 45-page
12 objection and opposition to the Motion for
13 Preliminary Approval that was filed with the
14 district court. All of the issues that are before
15 you, these very basic conflicts, most notably the
16 CTE issue was brought before the district court--

17 JUDGE D. BROOKS SMITH: Okay.

18 STEVEN MOLO: --and the problem that
19 we're faced with and the problem we're faced with
20 on the time issue, that these are people whose
21 medical conditions are significantly
22 deteriorating. In some cases, they're dying,
23 while this litigation--

24 JUDGE D. BROOKS SMITH: There's no
25 question about that.

1 STEVEN MOLO: --goes on.

2 JUDGE D. BROOKS SMITH: But, Mr. Molo,
3 the role of the district judge in handling and
4 monitoring and managing a class action, is truly
5 unique. In fact, it is unique to the extent that
6 almost uniformly, courts of appeals have
7 characterized district judges as fiduciaries for
8 the class. Don't you think that what you are
9 doing is asking us to intervene in such a way
10 that we are interrupting and, in fact,
11 insinuating ourselves into a process wherein a
12 judicial officer has a fiduciary role that we, as
13 an Appellate Panel do not.

14 STEVE MOLO: Actually, the rules as they
15 were changed in 2003, the Advisory Committee
16 Notes make clear that once an objector comes
17 before the Appellate Court, the control of the
18 proceeding lies in the Court of Appeals and the
19 Court of Appeals may undertake review and
20 approval of the settlement--

21 JUDGE D. BROOKS SMITH: That puts--

22 STEVEN MOLO: --with the objector
23 [UNINTEL PHRASE].

24 JUDGE D. BROOKS SMITH: --a rabbit in a
25 hat if we take the 23(f).

1 STEVEN MOLO: Or may--that's correct. Or
2 may remand to the district court, but just--

3 JUDGE D. BROOKS SMITH: And in fact, the
4 - there are cases that say that the district
5 court has an ongoing responsibility to monitor
6 adequacy, which is part of your attack here.

7 STEVEN MOLO: I agree, I agree. The
8 problem is this though. Because this issue was
9 brought before the district court twice, and the
10 district court chose not to act on it. It was
11 brought before the court in a fulsome way. This
12 wasn't just some passing footnote--

13 JUDGE KENT A. JORDAN: Yeah, but you
14 said that multiple times and I'm trying to
15 grapple a little bit with the relevance of that.
16 Is the implication of what you're saying that you
17 don't think Judge Brody is going to give you a
18 fair consideration of that later? That you -
19 because she didn't do it on the timeline you
20 wanted, you're not going to have a fair
21 consideration at the hearing?

22 STEVEN MOLO: Experience would suggest
23 that if it's been raised twice, and the court has
24 not done anything with it, because--

25 JUDGE KENT A. JORDAN: But--

1 JUDGE THOMAS AMBRO: But, but--

2 JUDGE KENT A. JORDAN: Wouldn't
3 experience just perhaps tell you that she's
4 managing the case the way thinks it ought to be
5 managed, and you're going to have a full and fair
6 hearing.

7 STEVEN MOLO: But here's the problem,
8 Judge Jordan, if I may. When I was talking about
9 the injuries to these class members, all right,
10 and we're talking about the opportunity here to
11 fix a problem. This court can fix this problem,
12 so that when we go forward with the fairness
13 hearing, we're not dealing with this issue again--
14 -

15 JUDGE THOMAS AMBRO: But by coming to
16 us, you're asking us to fix the problem, take the
17 matter, deal with the objections on the merits
18 and thereby delay a matter that you claim needs
19 to be expedited. You don't really want to delay
20 the November 19 hearing, do you?

21 STEVEN MOLO: No. And I don't think we
22 need to. I don't think we need to.

23 JUDGE THOMAS AMBRO: But if you're
24 successful with regard to this appeal, would you
25 not delay it?

1 STEVEN MOLO: I don't believe so because
2 the ultimate delay is going arise if we go
3 through that fairness hearing. We have this class
4 as certified, right? That's going to before that
5 court to make that determination. There are clear
6 errors in this class. I mean there's clearly--

7 JUDGE KENT A. JORDAN: Well--

8 JUDGE THOMAS AMBRO: Let's assume that
9 there are.

10 STEVEN MOLO: Okay.

11 JUDGE THOMAS AMBRO: Why not have those
12 dealt with at the November 19th fairness hearing?

13 STEVEN MOLO: Because it will delay
14 things. You know, the delay in Rodriguez between
15 the time--

16 JUDGE THOMAS AMBRO: Wait a minute, time
17 out. How will it delay things?

18 STEVEN MOLO: Because what will happen
19 is we're going through the fairness hearing. If
20 the court, at that point, does what we're asking
21 this court to do right now, which is to say, the
22 class was erroneously certified due to the
23 inadequate representation and the conflicts that
24 are there, that if we go through the fairness
25 hearing and that happens then, then we're back to

1 square one. We--

2 JUDGE D. BROOKS SMITH: You're not
3 suggesting--

4 STEVEN MOLO: --could be there now.

5 JUDGE D. BROOKS SMITH: --are you, Mr.
6 Molo, that somehow an attenuation in the approval
7 process required because of the requirement of a
8 fairness hearing, ought somehow to affect how we
9 construe whether this is an order granting or
10 denying class action certification, are you?

11 STEVEN MOLO: No, Judge Smith, I think
12 that there's no question it's an order--

13 JUDGE D. BROOKS SMITH: I mean that is
14 the sole issue before this court, isn't it?
15 Whether or not the order appealed from is an
16 order granting or denying the class action
17 [UNINTEL].

18 JUDGE THOMAS AMBRO: Yeah, hang on. If
19 he would just finish this. You were going to
20 answer that before you went to the second part of
21 that.

22 STEVEN MOLO: Okay, so I--

23 JUDGE D. BROOKS SMITH: And I'm sorry if
24 I stepped--

25 JUDGE THOMAS AMBRO: You were starting

1 to say something and then you got interrupted
2 before you finished your answer.

3 STEVEN MOLO: All right.

4 JUDGE D. BROOKS SMITH: I apologize.

5 STEVEN MOLO: First of all, it isn't--
6 your question, Judge Ambro, you were asking me--
7 okay.

8 JUDGE THOMAS AMBRO: No, he was asking
9 the first question and you were responding to his
10 first question.

11 STEVEN MOLO: Okay.

12 JUDGE THOMAS AMBRO: Maybe it's now
13 passed.

14 STEVEN MOLO: Is why--what it was-- what
15 we're here before. The issue here, Judge Smith,
16 again, you go to the rules, go to Advisory
17 Committee, it's clear. If the rules say up or
18 down, it's a class or it's not a class. And the
19 judge set forth, you know, an adjudication of the
20 parties' rights as--through that class
21 certification process, the preliminary approval
22 [STAY?]. She did. And that what happens--

23 JUDGE D. BROOKS SMITH: Can you point us
24 to a single case where a court has found that an
25 order, whether it be characterized as conditional

1 or tentative or some--with some similar modifier,
2 has--and at the same time, set a subsequent date
3 in that order for ultimate certification has
4 considered that to be an appealable order under
5 23(f)?

6 STEVEN MOLO: There's no case that I can
7 point you to where a court--

8 JUDGE D. BROOKS SMITH: I couldn't find
9 one.

10 STEVEN MOLO: Well, where a court
11 decided this issue, what the rule provides for.
12 And the one case that was cited by the other
13 side, the Liles case, out of the 8th Circuit, the
14 court had the issue before it. It was admitted--

15 JUDGE THOMAS AMBRO: Well, they didn't
16 quite. The 2003 Amendments went into effect on
17 December 1. The case was argued orally before
18 December 1 and the opinion issued on December 2
19 with no discussion whatsoever whether the court
20 had the authority or jurisdiction to entertain a
21 23(f) appeal.

22 STEVEN MOLO: Well, you're correct,
23 Judge Ambro. It didn't discuss it, but what it
24 did do, was say that we're--that there's a
25 limited fund here and we're going to send it back

1 to the district court. It didn't say that it
2 couldn't review it.

3 JUDGE THOMAS AMBRO: Well--

4 STEVEN MOLO: And I'm not arguing--

5 JUDGE THOMAS AMBRO: But that case
6 really cuts against you if--even if we do have
7 the authority to--because what it is says is
8 we're not going to get into premature--if a
9 matter is prematurely before us, we're going to
10 let the district court have the first cut at it
11 before it comes back to us.

12 STEVEN MOLO: It actually the case says
13 that there--because there was a limited amount of
14 money, it wasn't going to require the litigants--
15 it was a [UNINTEL]

16 JUDGE THOMAS AMBRO: But they also used
17 the word "premature."

18 STEVEN MOLO: --a wasting. Yeah, wasting
19 insurance policy, but the point is that you do
20 have the authority under the rule. The rule talks
21 about unfettered discretion and the idea--

22 JUDGE D. BROOKS SMITH: Unfettered
23 discretion to do what?

24 STEVEN MOLO: To fix the problem now and
25 save us time--

1 JUDGE KENT A. JORDAN: Whoa, whoa, whoa-

2 -

3 JUDGE D. BROOKS SMITH: Wasn't that
4 unfettered to discretion to design and determine
5 those standards that courts would apply with
6 application of 23(f) in the wake of 23(f)'s
7 adoption?

8 STEVEN MOLO: It was unfettered
9 discretion to take a case under 23(f) or not take
10 a case. And it goes back, Judge Smith, to the
11 point that you make it was inherently class
12 actions are an equitable creature, in nature,
13 historically, correct?

14 JUDGE KENT A. JORDAN: Yeah, but it's
15 unfettered--

16 STEVEN MOLO: And so the opportunity now
17 to allow this court to exercise its jurisdiction,
18 23 gives a very broad authority--

19 JUDGE KENT A. JORDAN: That's where
20 you've got, you know, I know you want to--I know
21 you've got stuff you want to say and you want to
22 keep firing through this, but I'm struggling with
23 your assertion that this unfettered discretion
24 somehow eliminates the requirement that there be
25 a final order of certification for us to exercise

1 unfettered discretion on. I mean, does unfettered
2 discretion mean--assume Judge Brody were in the
3 hearing and said, "You know what? I think that
4 sounds pretty good. That's the sort of
5 certification order I think I can sign. It sounds
6 okay to me." You know, unfettered discretion,
7 would we be in a position where you could come to
8 us and say, "She said she liked it." She didn't
9 sign anything. She didn't even say she was going
10 to do it, but she said she liked it. You've got
11 unfettered discretion. You should take it now.

12 STEVEN MOLO: I don't believe that
13 probably would be a decision that would be
14 subject to--

15 JUDGE D. BROOKS SMITH: What if she said
16 she really, really, really liked it? [LAUGHTER]

17 STEVEN MOLO: I would say, "You really,
18 really, really shouldn't take it," because at
19 that point in time, it's not really an order that
20 is certifying a class. The rule says--

21 JUDGE KENT A. JORDAN: So you would
22 acknowledge, wouldn't you, that it's not
23 unfettered discretion, that there's got to be
24 some kind of an order that you can look at and
25 say, you know what? That looks for the all

1 world, like it's the final decision on
2 certification. Because once you admit that a
3 preliminary comment or statement about
4 certification is really not a certification,
5 aren't you acknowledging that a judge can say
6 things that would tell you, wait I'm not done
7 here yet, and we should pay attention to that?

8 STEVEN MOLO: Judge, the answer is once
9 the judge says that it's certified, whether she
10 says it's preliminarily certified, conditionally
11 certified--

12 JUDGE KENT A. JORDAN: I don't want to
13 make an offend--her an offender for a word. If
14 the word "certification" is so troubling to you
15 that, let's focus on another word. She says
16 "final" in the same sentence. She says I'm going
17 to give final consideration to this at a later
18 date. Why not wait for that?

19 STEVEN MOLO: Because final
20 consideration--the only final consideration,
21 right, is at--with a final judgment. 23(c)(1)(C),
22 says, " An order that grants or denies class
23 certification may be altered or amended before
24 final judgment." In fact, the rule was changed to
25 use the word "judgment" to make clear that that's

1 the case. It can always be altered or amended.

2 So once a judge says I'm certifying the
3 class and here for purposes to delay or hold a
4 fairness hearing, but also to adjudicate the
5 rights of the parties to say, either opt in, opt
6 out, object. And we're going to go forward with
7 this class certification, the fairness hearing on
8 the class that's certified. We have a right to
9 come before you. You don't have to say we have to
10 sit here--we get to sit here, but we have the
11 right under the rule to ask this court to
12 exercise jurisdiction to intervene earlier--if I
13 may just one second?

14 The purpose of the rule that Judge
15 Ambro was alluding to before, right, was to allow
16 for a Court of Appeals to have an early
17 intervention in an issue where a class--there was
18 a real problem with the class certification
19 because it would save the parties time and
20 effort. Here, if we can fix this now--

21 JUDGE THOMAS AMBRO: I mean, but
22 usually, when we talked about the reason for the
23 rule, usually that's a litigation class; is it
24 not?

25 STEVEN MOLO: I'm sorry?

1 JUDGE THOMAS AMBRO: It's usually a
2 litigation class.

3 STEVEN MOLO: It is, but in a--

4 JUDGE D. BROOKS SMITH: We wouldn't be
5 having this problem and this discussion if this
6 were a litigation class?

7 STEVEN MOLO: I wouldn't think so. But I
8 also think that this, just as a litigation class
9 gets the opportunity to come before you. Again,
10 not that you have to grant certification--or
11 grant a review of the case. It's akin to a
12 certification determination in a litigation
13 class. Think about that, right?

14 Because at the point in a litigation
15 class, you've got that decision made and then the
16 question is are going to go forward with the rest
17 of litigation? Is it going to create the
18 hydraulic pressure? It is going to force a party
19 to do one thing or another? Here, that
20 preliminary decision, first-time decision on
21 class certification comes at the time of the
22 preliminary approval and the court says, in this
23 case, she set forth all kinds of--

24 JUDGE KENT A. JORDAN: Who's
25 disadvantaged by this?

1 JUDGE D. BROOKS SMITH: Yeah.

2 JUDGE THOMAS AMBRO: Yeah.

3 STEVEN MOLO: I'm sorry?

4 JUDGE KENT A. JORDAN: You know--

5 STEVEN MOLO: Who's disadvantaged?

6 JUDGE KENT A. JORDAN: --we've talked a
7 couple of times--

8 JUDGE THOMAS AMBRO: Who's disadvantaged
9 at this stage, today--

10 STEVEN MOLO: The disadvantage lies with
11 the 20,000--

12 JUDGE THOMAS AMBRO: --on September 10
13 when you have a hearing on November 19?

14 STEVEN MOLO: --class members those of
15 whom are seriously injured. The NFL has said--

16 JUDGE KENT A. JORDAN: So this depends
17 upon accepting the practical argument that you're
18 making. In other words, you're making a--the
19 practical argument that what you're proposing,
20 which is immediate appellate review and however
21 long that takes and then a ruling on it and then
22 sending it back down to her, will be shorter and
23 to provoke less delay than going forward with the
24 hearing and presenting things to her and letting
25 things--

1 STEVEN MOLO: That is correct.

2 JUDGE KENT A. JORDAN: --take their
3 ordinary course. Why on--I'm grateful for your
4 faith in us, but what is--what prompts you to
5 think that having appellate procedures in the
6 middle of the district court proceedings is going
7 to be less time-consuming than allowing the judge
8 to manage the case, get you to hearing in
9 November and having to deal with it at that time
10 and then bringing your issues to us?

11 STEVEN MOLO: If I may?

12 JUDGE KENT A. JORDAN: Usually, you
13 think if--you know, if you break a process that
14 you're going to actually lose momentum and
15 sidetrack things and you're going to add delay.
16 Why do you think that's not the case here?

17 STEVEN MOLO: Because we have a
18 situation in which a substantial percentage of
19 the class has not been adequately represented.
20 There is a group of people that the settlement
21 provides--

22 JUDGE KENT A. JORDAN: I'm not
23 understanding how that--and I apologize if I'm--

24 STEVEN MOLO: Sure.

25 JUDGE KENT A. JORDAN: --just being

1 obtuse. I don't see how that answers the
2 practical point. I understand you've got a legal
3 point. I understand your legal point, but I
4 understand you to be saying we can't wait to talk
5 about our legal point because people are sick and
6 dying. We've got to have this reviewed by you
7 right now and I'm, as a--sticking on a practical
8 point, I'm just trying to understand why you
9 think that's going to be faster than us
10 addressing that legal point, you know, a couple
11 months from now?

12 STEVEN MOLO: If you'll indulge me for
13 just one minute?

14 JUDGE KENT A. JORDAN: Sure.

15 STEVEN MOLO: Okay. We've first have the
16 issue that has been before the district court.
17 We've talked about that. We've got the 20,000
18 class members. The third point here, this is a
19 very rare situation, a significant percentage of
20 the class has not been adequately represented.
21 That issue, the sooner that's addressed, the
22 sooner--there's going to have to be a
23 renegotiation of this settlement. There are
24 people whose rights were bargained away, who had
25 zero.

1 JUDGE D. BROOKS SMITH: And who better
2 to weigh in on the question of adequacy than the
3 district judge who has the fiduciary
4 responsibility to the class?

5 STEVEN MOLO: And that same district
6 court judge had the problem for the adequacy
7 raised twice and allowed the matter to go
8 forward--

9 JUDGE THOMAS AMBRO: Well, it's the same
10 district judge who last January said go back to
11 the drawing boards and come back, so--

12 JUDGE D. BROOKS SMITH: And the same
13 district judge, who according to the news reports
14 I read just this week, has asked for a closer
15 look at actuarial calculations.

16 STEVEN MOLO: That's correct. Well, she
17 did actually--

18 JUDGE D. BROOKS SMITH: She's working on
19 it even now.

20 STEVEN MOLO: I believe it wasn't so
21 much a closer look, it was allowing the release
22 of some of that information on the motions of
23 Bloomberg and other news agency.

24 JUDGE THOMAS AMBRO: I have a final
25 question before we get back for rebuttal. When

1 you went through the process of considering
2 whether to file a 23(f) appeal, or an attempt at
3 a 23(f) appeal, the comments to the 1998
4 Amendment say that a stay should be sought first
5 from the trial court. If the trial court refuses
6 to stay its action and explanation of its view
7 should weigh heavily with the Court of Appeals.
8 Why didn't you seek a stay?

9 STEVEN MOLO: Because at this point in
10 time, we believe that we could get before this
11 court, have this issue address as this court has
12 the authority to do it. We've raised this issue
13 with Judge Brody twice.

14 And I don't, for a minute, question her
15 desire to reach a settlement that would be fair
16 and prompt. It isn't. There are a significant
17 group of people whose rights have been bargained
18 away, who get nothing in this settlement. They
19 get nothing.

20 JUDGE THOMAS AMBRO: But the question
21 then becomes why come to us? You say, well,
22 she's decided against us twice--

23 JUDGE KENT A. JORDAN: Actually, I think
24 you said she hasn't decided twice, right? Isn't
25 that your problem? It's not that she's decided

1 against you, it's she hasn't decided the issue
2 and you want it decided now.

3 STEVEN MOLO: She certified the class.
4 She allowed the money to be spent on notice. She
5 allowed the parties rights to be [UNINTEL].

6 JUDGE KENT A. JORDAN: Well, you just--

7 JUDGE THOMAS AMBRO: So all the--then
8 all the more the reason if she hasn't dealt with
9 it twice in a way that you think as a full
10 addressing of the issue, why not put it front and
11 center at the November 19 fairness hearing?

12 STEVEN MOLO: Because if this court were
13 to address this issue now and tell the judge that
14 based upon the record before it, it's clear on
15 the face of the record, there is a substantial
16 percentage of class members who lack adequate
17 representation. They've got nothing. Their rights
18 were bargained away and that must be addressed.
19 This court has the authority to do that.

20 JUDGE THOMAS AMBRO: But what makes you
21 think that we're better equipped to do that with
22 a meager record than she is with a full record?

23 STEVEN MOLO: Because G.M. Trucks and in
24 Dewey, say that you look to the terms, the
25 distribution terms of the settlement on its face.

1 There's no need for any kind of evidentiary
2 record beyond that here to see that their--
3 parties who had CTE, a disease that the
4 plaintiffs--the lawyer for the class counsel says
5 on his website, that it's believed to be the most
6 serious and harmful disease that results from NFL
7 and concussions. It was on his website yesterday
8 and today, may not be there tomorrow. But it--
9 that gets nothing under the settlement.

10 And if this court isn't going to direct
11 the district court to act on that, then we're
12 back at square one. And if we raise this, yet, a
13 third time, it's not clear that the district
14 court would act on it.

15 JUDGE KENT A. JORDAN: Well, you don't
16 think that before class certification is made a
17 matter of final order by the district court that
18 she's going to actually rule on your motion? I
19 mean, you've got an issue. She hasn't ruled on it
20 yet when you wanted her to, but she said I'm
21 going to have this hearing. I'm going to be
22 ruling on things. I'm still struggling a little
23 bit to understand why you think she's not going
24 to give you a response.

25 JUDGE THOMAS AMBRO: A full hearing.

1 JUDGE KENT A. JORDAN: A full and fair
2 hearing. I've asked you before, do you have--are
3 you implying that you're not going to get a full,
4 fair consideration of your position? Because if
5 you are, other than the fact that she hasn't done
6 it yet, which sounds to me like a case management
7 question on your part, I'm not--I'm going to ask
8 you to tell me why. Why you think you're not
9 going to get a full, fair consideration of your
10 question when she sits down with all the people,
11 including objectors, in November?

12 STEVEN MOLO: And whether I do or I
13 don't--okay, whether I do or I don't, we have the
14 opportunity to fix a significant issue now and
15 expedite the process, so that these people who
16 are in need of relief can get it.

17 JUDGE KENT A. JORDAN: Right.

18 JUDGE THOMAS AMBRO: Okay.

19 STEVEN MOLO: The NFL said that they're
20 willing to now put a billion dollars to solve
21 this problem. These people are in need of relief.
22 That's the reason, Judge Jordan. If it's a matter
23 of six months, eight months, that's still
24 valuable. And I don't know whether the district
25 court is going to do anything differently based

1 upon what's happened before. No one has note. She
2 didn't write an opinion. She didn't write an
3 order. But she did write one order. She said the
4 class was certified for purposes of going
5 forward.

6 JUDGE THOMAS AMBRO: All right. We'll
7 get back on rebuttal. I think we've given you
8 about 25 minutes already. Thank you very much.

9 JUDGE D. BROOKS SMITH: Professor
10 Issacharoff?

11 SAMUEL ISSACHAROFF: May it please the
12 court, Samuel Issacharoff, on behalf of the
13 proposed settlement class. If I may, I'd like to
14 go right to the question that was left off at the
15 end about the authority of this court and the
16 jurisdictional basis for this.

17 Counsel opposite makes a lot of the
18 quotes from several cases in this court about the
19 unfettered discretions this court has under
20 23(f). In each of those cases, there was a final
21 order from the court below. All the cases
22 involving unfettered discretion go to whether or
23 not what are the standards for the application of
24 Rule 23(f). They don't go to the question whether
25 Rule 23(f) itself applies. And there's a reason

1 for that.

2 JUDGE KENT A. JORDAN: Well, let's take
3 that as a given. Why shouldn't we view this as
4 tantamount to a final certification? She's
5 talked about certification. She's gone through
6 the factors. She's looked at 23(a). She's looked
7 at 23(b). She said what she's going to do.

8 And, you know, it waddles and quacks
9 like a certification, why shouldn't we call it
10 what it is and as Mr. Molo says, if there's a
11 problem, fix it so that it's fixed?

12 SAMUEL ISSACHAROFF: Your Honor, I think
13 that the main reason is that 23(f) is actually a
14 jurisdictional provision and not simply a case
15 administration provision. And if I may, I'll walk
16 through why. 23(f) is a grant of jurisdictional
17 authority for interlocutory appeals.

18 Under 1292, there are four conditions
19 for interlocutory appeals. Not one of those is
20 met. There's no dispute about that, so we're
21 under 1290--

22 JUDGE THOMAS AMBRO: Yeah, but 23(f) is
23 different than 1292.

24 SAMUEL ISSACHAROFF: Well, 1292(e) says
25 that jurisdictionally, there can be an expansion

1 by Supreme Court Rules. So, in other words, 23(f)
2 has to be construed the way that jurisdictional
3 statutes are construed. 23(f) has a requirement
4 of certification.

5 Certification under 23(e)(2) is defined
6 by it--by the very terms of the rule, by the
7 language of the rule, as something that must
8 follow a fairness hearing and a determination by
9 the court that the settlement is fair, adequate
10 and reasonable. Neither one of those condition's
11 predicate has been satisfied here, which means
12 that the term "certification" for purposes of
13 23(f) has not had its day. It hasn't had its day
14 in court.

15 JUDGE D. BROOKS SMITH: Beyond that, Mr.
16 Issacharoff, wasn't the district court here doing
17 nothing more than engaging in the kind of case
18 management steps that are called for in the
19 Manual for Complex Litigation--

20 SAMUEL ISSACHAROFF: Absolutely, Your
21 Honor.

22 JUDGE D. BROOKS SMITH: --which she
23 specifically cites to section 21.632? And in
24 relevant part that reads "The judge should make a
25 preliminary determination that the proposed class

1 satisfies the criteria set out in Rule 23(a) and
2 at least one of the subsections of Rule 23(b)."

3 SAMUEL ISSACHAROFF: I fully agree with
4 that, Your Honor. The problem that we have in
5 this case is that you can only--this is not a
6 question of moving first base back five feet,
7 this is moving it forward five feet infinitely
8 closer to home plate, because there has to be
9 some--

10 JUDGE THOMAS AMBRO: But this is--this
11 is football. [LAUGHTER]

12 JUDGE KENT A. JORDAN: Yeah, we've got
13 to-- we're mixing our sports metaphors.

14 JUDGE D. BROOKS SMITH: Coming from a
15 guy who roots from the [BRAWNS?], he doesn't know
16 much about football. [LAUGHTER] And [UNINTEL
17 PHRASE].

18 SAMUEL ISSACHAROFF: I should've known
19 better. I walked into that one. I apologize.

20 JUDGE D. BROOKS SMITH: Can a district
21 court certify a settlement class conditionally?

22 SAMUEL ISSACHAROFF: Can a district
23 court--I don't think that has meaning after the
24 2003 Amendments, Your Honor.

25 JUDGE D. BROOKS SMITH: If you're right,

1 how do we tell a district court that we can't do
2 that--that it can't do that if we don't have
3 jurisdiction?

4 SAMUEL ISSACHAROFF: I don't think that
5 there's a basis for this court to say that. I
6 agree with--

7 JUDGE D. BROOKS SMITH: But I'm saying,
8 if it's wrong, if it did something that's wrong,
9 it conditionally certified a settlement class and
10 it cannot do that, how do we, the Court of
11 Appeals, tell a district court it is wrong if we
12 don't have the authority to do so?

13 SAMUEL ISSACHAROFF: Well, there's
14 always mandamus and there's always 1292
15 certification. There is an order of this court in
16 1997, there's no opinion attached to it, but
17 there's an order in the Bone Screw litigation.
18 This is a year prior to 23(f), in which someone
19 tried to take an appeal from the preliminary
20 approval of a settlement for purposes of sending
21 out notice. It came up to this court and this
22 court said, flatly, we don't have jurisdiction,
23 we dismiss. Now, in that case, it was closer--

24 JUDGE D. BROOKS SMITH: But I'm asking
25 you a practical question.

1 SAMUEL ISSACHAROFF: As a practical
2 question, it can't come up in a way that's
3 meaningful for appellate review. The same problem
4 is going to come up that we have in this case.
5 There's factual allegations all over the place. A
6 drug exposure causes stroke--

7 JUDGE D. BROOKS SMITH: Well, the point
8 is--the point being that a district court, you
9 say, cannot conditionally certify any longer a
10 settlement class. How can we, as a Court of
11 Appeals, tell a district court today, it can't do
12 that if we don't have jurisdiction?

13 SAMUEL ISSACHAROFF: I don't believe you
14 can under the terms of 23(f). You can do so if
15 there is a 1292 certification, or you can do so
16 by mandamus. I do not believe that 23(f) gives
17 this court the authority to act, except as a
18 consequence of a certification, which the rule--

19 JUDGE KENT A. JORDAN: Of course, they--

20 SAMUEL ISSACHAROFF: --and the cases
21 define in a certain way as requiring findings.

22 JUDGE KENT A. JORDAN: Well, they say
23 that those findings are effectively there and
24 they characterize all certifications as tentative
25 in a respect.

1 So I want you to respond, if you would,
2 assert to their footnote 2 in their Reply Brief
3 where they say "The Advisory Committee's
4 reference to tentative certification is merely
5 acknowledgement that all certifications are
6 tentative because every order that grants or
7 denies class certification may be altered or
8 amended before the judgment."

9 In other words, everything's tentative
10 in a respect, so there's no such thing here as a
11 preliminary. You both seem to agree that there's
12 no such thing as a preliminary certification. But
13 whereas you would say that means the real
14 certification is coming later, they say no. That
15 means it's now; it's happened. What's wrong with
16 their reasoning?

17 SAMUEL ISSACHAROFF: Well, their
18 reasoning is that in 2003, the rules were changed
19 to eliminate the condition that that was being
20 addressed in the 1998--

21 JUDGE KENT A. JORDAN: They claim that
22 you're conflating "tentative" and "conditional."
23 And that the one isn't the same as the other.
24 What's--

25 JUDGE THOMAS AMBRO: Well, tentative

1 appears in the notes, doesn't it?

2 SAMUEL ISSACHAROFF: Yes.

3 JUDGE THOMAS AMBRO: Somewhere. But
4 conditional certification was the phenomenon that
5 2003 Amendment was directed at.

6 SAMUEL ISSACHAROFF: Right. And there is
7 not a robust case law that distinguishes those
8 two terms. Those were terms that were
9 conventionally used by the district courts and I
10 don't think that there was a lot of attention
11 paid one way or the other.

12 But this court, in the Dewey case, for
13 example, says that it is a requirement that there
14 be certain kinds of findings that are made as a
15 condition of certification. This court has said
16 the same thing in Rodriguez. This court has said
17 this going back 40 years to the Girsh factors.

18 So, if you look at the uninterrupted
19 case law of this court, what you find over and
20 over again is that there is an obligation of the
21 district court when it certifies a settlement
22 class to engage in a prescribed set of practices.
23 And what's being asked--

24 JUDGE D. BROOKS SMITH: Well, it has to
25 comply with what, 23(a) and (b)?

1 SAMUEL ISSACHAROFF: That it has to
2 comply with 23(a) and (b) and--

3 JUDGE D. BROOKS SMITH: And a court did
4 that here under pages 13 to 17 of her Memorandum
5 Opinion.

6 SAMUEL ISSACHAROFF: No, I don't believe
7 she did, Your Honor. I think--

8 JUDGE D. BROOKS SMITH: Well, what did
9 she do on pages 13 to 17?

10 SAMUEL ISSACHAROFF: Yes, she made
11 preliminary findings based on the initial record,
12 but this is--the problem we have here is that
13 this is not the product for an adversarial
14 process. There is not notice out to potential
15 objectors at this point.

16 JUDGE D. BROOKS SMITH: I thought what
17 you were saying in answer to my question is when
18 she said in her order, that this is a conditional
19 approval of a settlement class, that she can't do
20 that.

21 SAMUEL ISSACHAROFF: No, she can't. It
22 can't have the effect of binding anybody to a
23 class in a--in what certification means.
24 Certification means you are a party as this court
25 discussed in the Dewey case--

1 JUDGE D. BROOKS SMITH: A party for
2 settlement purposes?

3 SAMUEL ISSACHAROFF: You're a party for
4 appellate purposes and party for res judicata
5 purposes, which is the most important thing. No
6 one is a party for res judicata purposes and at
7 this point, because nobody has been brought into
8 the class by operation of an order. The only
9 order is the permission of notice.

10 And how can you have--we're going to
11 keep jumping ahead. I used the baseball metaphor;
12 wrong one, but you're going to keep jumping ahead
13 of yourself here because now you're going to have
14 to--

15 JUDGE D. BROOKS SMITH: No, actually, I
16 don't want to jump ahead. I want to go back.
17 Because if the--what I'm trying to figure out is
18 I asked you can a district court conditionally
19 certify a settlement class? You said no. Stop on
20 that first question. How do you--isn't that
21 intention with the Second Circuit case of Denney
22 v. Deutsche Bank in 2006, which is at 443 F.3d
23 that says " we conclude that conditional
24 certification survives the 2003 amendment" and
25 that's a conditional certification of a

1 settlement class.

2 SAMUEL ISSACHAROFF: Yes, Your Honor, I
3 think there's terminological confusion that has
4 been across the board in the courts. What were
5 the 2003 amendments directed at? What the 2003
6 amendments were concerned about is courts that
7 said without benefit of a hearing, without
8 benefit of making all the determinations--

9 JUDGE D. BROOKS SMITH: Correct.

10 SAMUEL ISSACHAROFF: --under Rule 23--

11 JUDGE D. BROOKS SMITH: They acted too
12 quickly and they put a lot of pressure on
13 defendants to settle.

14 SAMUEL ISSACHAROFF: Yeah, it was a what
15 the heck-type of standard on class certification.
16 And that's what 2003 came along and said you
17 can't do that anymore.

18 JUDGE D. BROOKS SMITH: You've got to
19 give a lot--you have to give a lot more analysis.

20 SAMUEL ISSACHAROFF: Some courts call
21 that tentative. Some courts call that
22 conditional. Some courts said this is only on the
23 pleadings and we will deal with this--

24 JUDGE D. BROOKS SMITH: But remember
25 this Denney decision is from 2006.

1 SAMUEL ISSACHAROFF: The Denney decision
2 is from 2006, but I don't recall the Denney
3 decision going up on that question. I recall the
4 Denney decision going up on the certification--

5 JUDGE D. BROOKS SMITH: Now it was the
6 holding of the court, on page 270, "We conclude
7 that conditional certification survives the 2003
8 amendment to Rule 23(c)(1)."

9 SAMUEL ISSACHAROFF: Okay. I can't
10 respond to that. I don't have the [UNINTEL] in
11 mind.

12 JUDGE D. BROOKS SMITH: Well, and you've
13 got some--you've got a former Chief Judge Jacobs.
14 You have the current Chief Judge--

15 SAMUEL ISSACHAROFF: Yes.

16 JUDGE D. BROOKS SMITH: --Katzmann. I
17 mean, these are pretty smart folks.

18 SAMUEL ISSACHAROFF: I don't dispute
19 that.

20 JUDGE D. BROOKS SMITH: And so I'm
21 trying to figure out why they say that so
22 conclusively and yet maybe that's not the case.

23 SAMUEL ISSACHAROFF: Well, I would
24 suggest, Your Honor, that what they--

25 JUDGE D. BROOKS SMITH: Because there's

1 an argument that the--what was done in 2003 does
2 support what you say.

3 SAMUEL ISSACHAROFF: I don't think that
4 Denney, as I recall the case. I did not review
5 that case because it wasn't focused in any of the
6 briefs, but I did--but my recollection of Denney
7 was that that was--the question was on whether
8 the district court properly gave notice.

9 And for that purpose, the conditional,
10 whatever term we used, the conditional term, is
11 adequate because it just says the court has done
12 enough to look at it to make sure that notice is
13 going to the right people.

14 JUDGE KENT A. JORDAN: Well, you've
15 noticed the terminological muddle that folks seem
16 to be in. Is there something in the 2003
17 Amendments that implies or says that a court
18 can't take a preliminary step, whether you call
19 it certification or not, for purpose of
20 establishing the framework for notice?

21 SAMUEL ISSACHAROFF: No, I think
22 absolutely not. I think that the 2003 Amendments
23 are entirely consistent with the Manual for
24 Complex Litigation in that regard.

25 JUDGE KENT A. JORDAN: And which

1 continues the complex litigation manual, that she
2 cited was from 2004. So either that hadn't caught
3 up with the language, or the people putting the
4 manual together still seem to think that that's
5 the ordinary course of things, that there will be
6 some - whatever you call it, whatever label you
7 want to put on it, there'll be some decision by a
8 court, district court that will allow a notice to
9 go out based on early thinking on what the class
10 is going to look like. Is that right?

11 SAMUEL ISSACHAROFF: I think that's
12 correct. I think it's also correct that the
13 manual is out of date in terms of its language.
14 It's a source of irritation among district court
15 judges that it hasn't caught up.

16 JUDGE KENT A. JORDAN: So what should it
17 be called? What should, and I'll be curious to
18 ask Mr. Molo the same question, what should she
19 have done to effectuate what it appears she was
20 trying to do?

21 SAMUEL ISSACHAROFF: She should've done
22 exactly what she did.

23 JUDGE KENT A. JORDAN: Well, evidently
24 not--

25 SAMUEL ISSACHAROFF: She engaged in a

1 preliminary review. She--

2 JUDGE KENT A. JORDAN: --because you're
3 saying she shouldn't have called this a
4 conditional certification. What should she have
5 called the thing she was doing?

6 SAMUEL ISSACHAROFF: No, there's nothing
7 wrong with calling it a conditional
8 certification. What the 2003 Amendments were very
9 clear on is that that is not a class
10 certification, whatever you call it.

11 JUDGE D. BROOKS SMITH: So it doesn't
12 matter what you call it.

13 SAMUEL ISSACHAROFF: Exactly.

14 JUDGE D. BROOKS SMITH: It matters what
15 it is and the degree of finality that it attaches
16 to it. Is that point?

17 SAMUEL ISSACHAROFF: That's exactly--

18 JUDGE THOMAS AMBRO: [YEAH, SAY YES?].

19 SAMUEL ISSACHAROFF: --correct, Judge
20 Smith. That's exactly my point here. [UNINTEL
21 PHRASE].

22 JUDGE KENT A. JORDAN: And what should
23 she have called it? If you folks were writing
24 this up in a way that would solve the
25 terminological muddle, what would you suggest the

1 district courts call that thing they're doing?

2 SAMUEL ISSACHAROFF: Well, I had some
3 occasion during the ALI process to look at this
4 question and we decided to call it preliminary
5 review. And we said the court should engage in a
6 preliminary review to make sure that the notice
7 is not wasted and to make sure that it looks and
8 smells like something that could pass muster. Not
9 that it has.

10 And there was a big concern that you
11 don't want judges to do too much because you want
12 Mr. Molo to have a fair shot at the fairness
13 hearing. You want the fairness hearing to be the
14 main event. There was also a problem prior to
15 2003 that judges did the whole work up at the
16 preliminary hearing and then got to the fairness
17 hearing and said already decided. We don't need
18 to have a hearing. And 2003 put an end to that.
19 It said you must have a hearing and you must make
20 these findings at that time.

21 JUDGE KENT A. JORDAN: Is there any
22 inference we should draw from the fact that Mr.
23 Molo raised at least three times, so it's clearly
24 of important feature for them--maybe four times,
25 that the issues that are being presented to us in

1 their argument about class certification today
2 were presented to Judge Brody twice before and
3 that they were not addressed.

4 Is that something that should be
5 troubling to us? Should we be saying, wait a
6 second. They're not--they are indeed not going to
7 get the fair shot. This is--this train has gone
8 too far down the tracks. That certification is
9 going to be final in name only because the real
10 certification is final already.

11 SAMUEL ISSACHAROFF: Well, I'd say two
12 things about that. They presented it first in a
13 Motion to Intervene. And a Motion to Intervene
14 after Devlin v. Scardelletti, has no meaning at
15 this point because they are fully going to be
16 parties at the time of the fairness hearing if
17 there is a--

18 JUDGE THOMAS AMBRO: And with a right to
19 appeal, right?

20 SAMUEL ISSACHAROFF: With a right of
21 appeal. As this court said in Dewey--

22 JUDGE THOMAS AMBRO: Right.

23 SAMUEL ISSACHAROFF: You become a party
24 at that point anyway, so the intervention has no
25 meaning. So that's just a procedurally erroneous

1 step to be taken at this point in the
2 proceedings.

3 And the other was to say to put in the
4 papers at the preliminary stage and say, "We
5 object on the merits." And Judge Brody says,
6 "Okay, we'll hear that, but we'll hear that in
7 November in an orderly way, the way that this is
8 supposed to be done."

9 So I don't think that there's anything
10 that can be--that can be taken from that except
11 that they were procedurally out of step in the
12 district court just like they're procedurally out
13 of step in this court. And--

14 JUDGE THOMAS AMBRO: Were you in any way
15 involved in 2003 when the amendments were
16 drafted?

17 SAMUEL ISSACHAROFF: No, not in any
18 direct way, Your Honor.

19 JUDGE THOMAS AMBRO: No, indirect way.
20 Because the question is that if you basically
21 change 23(c)(1)(C) and take "conditional" out of
22 the certification, why wasn't 23(f) changed to
23 put the word "final" in front of order, for
24 example? Why weren't the notes to 23(f) changed
25 to say, hey, folks. It's no longer unfettered

1 discretion, et cetera.

2 SAMUEL ISSACHAROFF: Your Honor, the
3 notes to the Advisory Committee Notes and the
4 rules are problematic. They look like legislative
5 history and they have--there is an attempt by the
6 courts when there's ambiguity--

7 JUDGE THOMAS AMBRO: Although these are
8 - this is far more than legislative history. I
9 mean, they look like legislative history, but
10 legislative history often is written by a staffer
11 for a boss on a committee and not necessarily for
12 the whole the committee, and Lord knows if you
13 have amendment on the floor that somebody writes
14 something two weeks later.

15 SAMUEL ISSACHAROFF: Right.

16 JUDGE THOMAS AMBRO: This is a group
17 that is drafting the notes at the same time it is
18 drafting round after round after round of the
19 proposed rules. So it seems to be qualitatively
20 different.

21 SAMUEL ISSACHAROFF: I can't answer that
22 question. There are always errors, blips in
23 language that come up in these cases. But I can't
24 answer that question. I don't know why it wasn't
25 changed, but we have the language that we have

1 and the best indication of what is meant by
2 certification under 23(f) has to be the place
3 where settlement certification is defined which
4 is in 23(e)(2). And that has a set of procedural
5 requirements which the court hasn't had a chance
6 to do.

7 And if I could add one more thing, this
8 court, in several cases, most notably in the
9 Rodriguez case, admonished district courts that
10 they must complete their tasks. They must follow
11 the analytic steps, every analytic step of making
12 sure 23(a) and (b) are satisfied. It would be
13 tremendously paradoxical if this court now
14 interceded before the district court had a chance
15 to do that. You're being asked to preempt the
16 district court from doing what you have
17 repeatedly insisted that they do---

18 JUDGE THOMAS AMBRO: All right. It isn't
19 the best argument that no matter what, whether we
20 have jurisdiction or we don't have jurisdiction,
21 authority or we don't have authority to enter
22 this fray. It's premature for us to do so.

23 SAMUEL ISSACHAROFF: It's absolutely
24 premature for the reasons the Liles court said
25 regardless of the jurisdictional question. It's

1 also premature as Judge Jordan was insisting as a
2 practical matter. There are all these factual
3 issues that have to be resolved here. There's not
4 a record to resolve them on.

5 So you would have to have some kind of
6 preliminary appellate ruling that looked--or
7 appellate argument where we would come forward
8 and tell you what we think the record will show.
9 And then you'd have to hear it again when we've
10 actually established what the record does show.

11 Because right now, every factual
12 assertion from the nature of CTE to the cause of
13 strokes to the relationship to NFL Europe, all
14 those sorts of things are matters of conjecture,
15 that there are no facts in the record that this
16 court can reasonably respond to.

17 JUDGE D. BROOKS SMITH: So, you could
18 have, right now, redeemed yourself for your
19 metaphoric missteps simply by saying "false
20 start" on the part of the offense.

21 SAMUEL ISSACHAROFF: I would say off
22 sides, but, yes, Your Honor.

23 JUDGE THOMAS AMBRO: Would the
24 petitioners, would they be compensated under the
25 proposed settlement?

1 SAMUEL ISSACHAROFF: The petitioners--

2 JUDGE THOMAS AMBRO: The people that Mr.
3 Molo represents.

4 SAMUEL ISSACHAROFF: Your Honor, I don't
5 know the answer to that because we don't have
6 facts of record on the petitioners. We know they
7 haven't filed suit, so we don't know any of the
8 particulars. We don't have any court pleadings of
9 them. They haven't put in their medical records.
10 I have no way of knowing that. This court has no
11 way of knowing that. Perhaps, even the
12 petitioners themselves don't know that yet
13 because they haven't done the work-up.

14 But one thing is clear, they haven't
15 filed suit. They're not sub judice anywhere in
16 the world.

17 JUDGE THOMAS AMBRO: Okay. Thank you
18 very much.

19 JUDGE D. BROOKS SMITH: Just one more
20 thing--

21 JUDGE KENT A. JORDAN: Go ahead.

22 JUDGE D. BROOKS SMITH: --if I could,
23 please, Mr. Issacharoff. Am I putting in my
24 earlier questions too much emphasis on the role
25 of the district judge as fiduciary for the class

1 here, or should that be something that factors in
2 to our consideration for why the district court
3 should have the opportunity to continue moving
4 forward and protecting adequacy, among other
5 things?

6 SAMUEL ISSACHAROFF: Well, the concept
7 of fiduciary for the class probably begins when
8 the Judge [POSER?] opinion--

9 JUDGE D. BROOKS SMITH: Right.

10 SAMUEL ISSACHAROFF: --as much
11 jurisprudence does singularly.

12 JUDGE D. BROOKS SMITH: --Sure. But this
13 court has embraced--

14 SAMUEL ISSACHAROFF: This court has
15 accepted it.

16 JUDGE D. BROOKS SMITH: --the notion as
17 well.

18 SAMUEL ISSACHAROFF: And in each case,
19 it's been used to impose upon the district a
20 heightened duty of scrutiny of the facts of the
21 case. That's how it began in the Reynolds case in
22 the Seventh Circuit. That's how it's been applied
23 in this case. Again, I go back to my point that
24 would paradoxical for this court to intercede
25 before the district court has done that in order

1 to say you've breached your fiduciary duty before
2 you've had a chance to exercise it in the way
3 that we, in cases like Dewey and Rodriguez and
4 Dewey and [WASHINGTON?] have insisted that you do
5 use it.

6 JUDGE D. BROOKS SMITH: Okay. Thank you
7 very much.

8 SAMUEL ISSACHAROFF: Thank you very
9 much, Your Honor.

10 BRUCE BIRENBOIM: May it please the
11 court, Bruce Birenboim from Paul, Weiss, Rifkind,
12 Wharton & Garrison for the NFL defendants. Let me
13 just make--

14 JUDGE D. BROOKS SMITH: Can I just ask a
15 question at the outset that I'd asked of your co-
16 counsel. Would the petitioners, to your
17 knowledge, be compensated under the proposed
18 settlement?

19 BRUCE BIRENBOIM: Well, my first answer
20 would be the same as my co-counsel here. There's
21 no record on that, but it certainly is the case
22 that all members of this class are compensated by
23 a Baseline Assessment Program. Anyone in the
24 Baseline Assessment Program is entitled to
25 supplemental benefits if they had certain

1 conditions.

2 And I think they're--I think one thing
3 in the papers that objection--the objectors
4 ignore is that those clients today had certain
5 symptoms may have even greater symptoms tomorrow
6 or a year from now, or two years from now. So if
7 the question is will these objectors be
8 compensated at some point? [UNINTEL] only know
9 with time. But they will be compensated to the
10 extent of Baseline Assessment and Testing. At a
11 minimum.

12 JUDGE D. BROOKS SMITH: Okay.

13 BRUCE BIRENBOIM: Let me just address a
14 couple of points that came up in the oral
15 argument. First, I think it's fair to say that
16 the elimination of conditional certification was
17 intended to prevent situations where the district
18 court says I will conditionally certify this
19 class and now we will go forward, for example,
20 and litigate and incur expenses. But I may come
21 back and then decide whether the Rule 23
22 requirements are met. That's what was eliminated.

23 But that's not the situation here
24 because between now and final approval, we are
25 not going forward either with litigation or with

1 settlement. We're simply going forward with the
2 process of developing a record so that the
3 district court can issue a ruling.

4 JUDGE THOMAS AMBRO: As I said, that
5 would seem to be the best argument that you have,
6 that it's premature for us to intercede at this
7 point in time prior to the November 19 hearing
8 and a final determination.

9 BRUCE BIRENBOIM: I think that's
10 correct, Judge Ambro. And I also think what
11 hasn't been mentioned is that there are
12 potentially a great many other objectors out
13 there who got notice of this proposed settlement
14 through the notice process. And the district
15 court should be permitted to develop a full
16 record that takes all objections into account,
17 not just these objections and balance all the
18 competing interests.

19 JUDGE KENT A. JORDAN: What's your
20 response though, Mr. Birenboim, to the argument
21 Mr. Molo made that the error the district court
22 has made with respect to his clients is manifest
23 on the record as it stands now. There's no need
24 for further development. Further development will
25 only delay, rectifying a problem that needs to be

1 fixed.

2 So, deal with it now, saves time, got
3 to save trouble later, everybody's going to be
4 better off if you just address the problem, which
5 is right there on the face of the papers in front
6 of you.

7 BRUCE BIRENBOIM: Well, the alleged
8 problem that's on the face of the papers is the
9 way CTE is treated, the way stroke is treated and
10 the way the European League is treated. There is
11 no record whatsoever on any of those three
12 complaints. Those three complaints should be
13 raised in the approval process before the
14 district court.

15 The parties and the objectors and other
16 objectors should be permitted to develop a
17 factual record to support or not support these
18 objections. And then when the district court has
19 had a chance to develop a full record and write a
20 considerate opinion on it, then Your Honors can
21 do your work, which is to review that record on
22 appeal. There is no record on any of the
23 allegations in objectors' briefs, other than the
24 mere fact that the settlement agreement says
25 certain diseases and certain conditions are

1 treated in certain ways.

2 And if there's one thing I think that's
3 as a practical matter, perfectly clear, which is
4 if this proposed settlement is to be considered
5 and be determined whether it is fair and adequate
6 by the district court, having what is in effect,
7 interlocutory review would slow that process
8 down.

9 The settlement should be permitted to
10 be reviewed by the district court on a full
11 record. All members of the class should be
12 permitted to make their objections. The district
13 court should be permitted to do its work and if
14 there are objections and appeals, we will be back
15 here in three or four months.

16 JUDGE THOMAS AMBRO: One question, which
17 if we ever did get to the merits of the
18 objections, and I'm not saying we should. Page 10
19 of the Notice of material states that "Monetary
20 awards are available for the diagnosis of ALS,
21 Parkinson's Disease--or Death with CTE. A
22 Qualifying Diagnosis may occur at any time until
23 the end of the 65-year term of the Monetary Award
24 Fund." How is that consistent with the terms of
25 the settlement agreement which it appears that if

1 you haven't died before July 7th, you can't be
2 diagnosed with CTE?

3 BRUCE BIRENBOIM: Well, Your Honor,
4 first, there are two other places in both the
5 long form notice and the short form notice that
6 they clear that CTE is awarded only in certain
7 circumstances. Concededly, the word "certain" is
8 not in the sentence, Your Honor read, but in that
9 same document it says "certain."

10 And just so the court understands the
11 situation, this settlement is intended to
12 compensate victims that have certain conditions.
13 It is not intended to compensate for diagnoses
14 absent conditions. So the issue is not whether
15 there is a diagnosis of CTE. The issue is whether
16 the player has certain conditions and certain
17 cognitive impairments.

18 JUDGE THOMAS AMBRO: Let's say that one
19 of the seven objectors is perfectly fine today,
20 but 10 years from now, after this settlement goes
21 through, dies and it's determined that that
22 person has CTE. You're saying that person is not
23 covered?

24 BRUCE BIRENBOIM: No, I think that
25 person in all likelihood, would be compensated

1 because they will have the time between now and
2 10 years from now to go see a doctor, get
3 diagnosed, get tested, and will be awarded
4 compensation if that--

5 JUDGE THOMAS AMBRO: But if it's CTE,
6 for example, you can't, at this point in time, we
7 don't seem to have the scientific ability to
8 determine that it exists until a person has
9 passed away.

10 BRUCE BIRENBOIM: That's correct because
11 CTE has not been scientifically proven to be a
12 disease. It's simply a pathology of brain
13 structure that leads to certain conditions. And
14 it's the conditions and the impairments and the
15 disabilities that entitle the player to an award.

16 And the only reason that we award under
17 this settlement, CTE pre-preliminary approval, is
18 because by definition, if a member of a class was
19 deceased pre-approval, they could not have gone
20 to a physician and gotten the diagnosis that's
21 required. So adding that into the settlement was
22 actually an attempt by both sides to ensure
23 fairness among players, both predeceased and who
24 may have conditions in the future.

25 JUDGE THOMAS AMBRO: Okay.

1 BRUCE BIRENBOIM: But I would emphasize
2 that there is no record. There is no medical
3 evidence whatsoever in this record right now to
4 even address what I'm saying to this Panel, which
5 is exactly why the district court should be
6 permitted to develop that record.

7 JUDGE THOMAS AMBRO: Thank you very
8 much.

9 BRUCE BIRENBOIM: Just one more point,
10 Your Honor. The--Mr. Molo mentioned several times
11 that he has grazed his objections with Judge
12 Brody and been denied. Objections were--

13 JUDGE THOMAS AMBRO: Denied or she
14 didn't deal with them?

15 BRUCE BIRENBOIM: She denied the
16 intervention and said that you may present your
17 objections at the fairness hearing. And I think
18 the law in the Third Circuit is that although
19 denials of intervention motions may be appealable
20 as a collateral order, they are not appealable if
21 the objector has a remedy, which is to appear at
22 the fairness hearing, make objections and then
23 take an appeal, which is this situation.

24 JUDGE THOMAS AMBRO: Thank you very
25 much.

1 BRUCE BIRENBOIM: Thank you, Your Honor.

2 JUDGE THOMAS AMBRO: Mr. Molo, you have
3 five minutes.

4 STEVEN MOLO: Thank you.

5 JUDGE THOMAS AMBRO: And because we gave
6 you, I think, 25, 26 minutes at the outset, we'll
7 probably pretty much stick to that, the five.

8 STEVEN MOLO: Thank you very much. I
9 appreciate the time the court has taken today.
10 First, can I address the CTE point, Judge Ambro?

11 JUDGE THOMAS AMBRO: Sure. Go ahead.

12 STEVEN MOLO: This is the fundamental
13 nature and Judge Jordan here raised, we're saying
14 here, is that this is such a blatant conflict
15 that it requires intervention now. The complaint
16 alleges that these MTBIs result in dementia,
17 Alzheimer's, Parkinson's, ALS and CTE. It clearly
18 alleges CTE. CTE is the only one of those
19 diseases that you get only by playing football or
20 by multiple brain injuries. The other diseases
21 can come upon a person apart from football. It's
22 the industrial disease of football, if you will.
23 The settlement compensates dementia, Alzheimer's,
24 Parkinson's and ALS, but not CTE. And unless you
25 die before the date of preliminary approval--

1 JUDGE KENT A. JORDAN: Well, help me out
2 here, Mr. Molo, because we just heard from Mr.
3 Birenboim telling us that there is a reason why
4 that order is structured the way it is set up.
5 And that the--that's going to be developed in
6 front of the district court judge and there'll be
7 factual underpinnings to explain why CTE is
8 treated one way and other things are treated
9 perhaps in a different way because CTE is, you
10 know, you get symptoms that get compensated
11 instead of the disease itself.

12 What--I take all that argument to be
13 another framing of the assertion that the
14 objectors are here too soon and you should wait,
15 judges, and they should wait, because this stuff
16 was going to be dealt with in an orderly manner.
17 What is the error in that kind of assertion?

18 STEVEN MOLO: The error is because the
19 error in the certification is so gross on its
20 face and there's such a large percentage, that
21 we're going to go through--

22 JUDGE KENT A. JORDAN: I didn't ask
23 [UNINTEL].

24 STEVEN MOLO: If I may, Judge Jordan,
25 we're going to go--

1 JUDGE KENT A. JORDAN: Let me try one
2 more time. I apologize because--

3 STEVEN MOLO: Okay.

4 JUDGE KENT A. JORDAN: --I didn't ask my
5 question in a succinct way. I think what they're
6 saying is the error is not on its face. You can't
7 look at the surface of this and say there's a
8 gross error there because in fact there's a whole
9 lot of factual stuff that you, judges, aren't
10 going to understand--

11 STEVEN MOLO: Well--

12 JUDGE KENT A. JORDAN: --until later.

13 STEVEN MOLO: --this is something that
14 can be understood just on the face. As I just
15 explained, the complaint alleges that CTE is one
16 of the diseases that is caused by MTBI. They pay
17 \$4 million--the settlement gets--compensates
18 someone \$4 million if you die with CTE before the
19 date of preliminary approval. If you die with CTE
20 after the date of preliminary approval, you get
21 nothing. And to your point, Judge Ambro, about
22 there's a debate about whether CTE can be
23 diagnosed now in someone who's living.

24 But assuming for the sake of argument
25 that it cannot be, that it only could be

1 diagnosed after you die, someone could be
2 diagnosed with CTE after the date of preliminary
3 approval and they get zero, they get zero. And
4 that's a problem here because it's the most
5 prominent disease. It's the most prevalent
6 disease to this class.

7 So this is not some small group that's
8 affected here. We're talking about the entire, a
9 significant portion of the class. Boston
10 University has been studying the brains of former
11 football players, 33 of 34 NFL players had been
12 diagnosed with CTE postmortem. And there's no
13 comparable prevalence of the other diseases in
14 this settlement. This is so gross on its face
15 that we think it should be addressed now. That's
16 what we're asking for.

17 And what's happened now is that the
18 district court has put in motion and adjudication
19 of parties' rights. The rules, by the way, say
20 that notice should only be sent after a class is
21 certified. When notice has been sent and the
22 parties have a choice, the parties can either
23 opt-out or they can object at the fairness
24 hearing, but that choice that they're required to
25 make, they're entitled to have made by a class--

1 or looking at a class that was appropriately
2 represented and it hasn't been represented here.
3 Neither have the two named representatives either
4 in subclass 1 or 2 allege that they either have
5 CTE or they were at risk of having CTE.

6 JUDGE KENT A. JORDAN: Leave that--

7 STEVEN MOLO: On its face, you can find
8 that.

9 JUDGE KENT A. JORDAN: Leave that aside
10 for a moment and speak, if you would, to the
11 argument made by Mr. Issacharoff that the rules
12 contrary to what you just said, the rules
13 specifically contemplate under 23(e)(2), that
14 certain things have to happen in the settlement
15 before there can be a class certification and
16 that those things haven't happened here.

17 STEVEN MOLO: Well, there was a--

18 JUDGE KENT A. JORDAN: Is he just
19 mistaken about what 23(e)(2) means?

20 STEVEN MOLO: There was a motion filed
21 setting forth the 23(a) factors and the 23(b)
22 factors. The court wrote an opinion. The court
23 issued notice. The court set the date for the
24 fairness hearing. And again--

25 JUDGE KENT A. JORDAN: I'm--

1 STEVEN MOLO: --if we look through the
2 rules, it says up or down, a court shall not
3 certify if it has any doubts.

4 JUDGE KENT A. JORDAN: Speak to the
5 23(e)(2) point that I'm attempting to ask you
6 about.

7 STEVEN MOLO: I'm sorry.

8 JUDGE KENT A. JORDAN: I understand who
9 could be saying there could not be what in--what
10 could accurately be called certification under
11 these circumstances because there are steps under
12 23(e)(2) which have to have been taken. Or maybe
13 I misunderstood and--

14 JUDGE THOMAS AMBRO: Including a
15 hearing.

16 JUDGE KENT A. JORDAN: But if I
17 understood him, he's saying, look at 23(e)(2),
18 that tells you things that have to happen before
19 they're certification and circumstances like
20 this. And they haven't happened. Is he wrong
21 about what 23(e)(2) means?

22 STEVEN MOLO: I believe so because when
23 you read it with the clear language in--and the
24 Advisory Committee [UNINTEL] 23(a), there is no
25 conditional class. There is no--there's a class.

1 There's either a class or there's not a class and
2 the judge determined here and set in motion an
3 adjudication of people's rights who are affected.

4 And they are titled "Due Process." It
5 titles them to a choice between either
6 participating in the class settlement that is
7 appropriately represented by people who share
8 their conditions and lawyers who have acted that
9 way or not. And that didn't happen here. And it's
10 not going to happen here.

11 And if we wait to go through a fairness
12 hearing and let's assume that we do have a
13 fairness hearing, and let's assume that Judge
14 Brody agrees with me and says, you know what?
15 There was inadequate representation. We could
16 have been dealing with that with an order from
17 this court saying that on the face of the
18 pleadings, just what I read to you, that there's
19 no class representative that claims to have CTE
20 or be at risk of contracting CTE. The complaint
21 alleges that it's serious. All CTE claims are
22 released. They are released. So a claim that the
23 parties, at \$4 million, if you died before the
24 date of preliminary approval, that the person who
25 dies the date after preliminary approval of CTE,

1 gets zero.

2 JUDGE KENT A. JORDAN: Are you saying
3 that she can't fix that? If she agrees that
4 that's the problem, that there's something that
5 she's - it's beyond her [AKIN?] to repair that?

6 STEVEN MOLO: It can be, but because
7 it's such a large group, all right? This is
8 material. It's a flaw that is central to the
9 class, that's central to the settlement and the
10 court is entitled to have, the parties are
11 entitled to have, adequate representation. This
12 isn't just a simple little fix. There's a need
13 for separate counsel to represent the people
14 whose rights have been bargained away,
15 substantial rights that have been bargained away.

16 And rights that the parties, the NFL
17 and the class counsel have acknowledged are worth
18 in the case of CTE, \$4 million at the time of
19 death. You can't just say--

20 JUDGE THOMAS AMBRO: And you don't think
21 Judge Brody--

22 STEVEN MOLO: --you go before the court
23 and fix that.

24 JUDGE THOMAS AMBRO: --with her past
25 record of having sent this case back is willing

1 to consider that fully and fairly?

2 STEVEN MOLO: I think that Judge Brody,
3 if she is instructed by this court, that there is
4 a flawed class.

5 JUDGE THOMAS AMBRO: But if your
6 argument is correct, why would she not just
7 accept what - that on her own? Why does she need
8 us to tell her?

9 STEVEN MOLO: Because even though it was
10 raised in the context of an intervention motion,
11 and even though it was raised in the context of
12 the preliminary--objection to preliminary
13 approval.

14 And it's true, the objection--the
15 motion to intervene was denied after we filed
16 this appeal. Because the judge had those
17 opportunities, this is such a fundamental flaw,
18 and if the judge didn't see it when we waved that
19 flag, waved two flags, high in the air, and did
20 nothing about it--

21 JUDGE THOMAS AMBRO: Well, but Mr.
22 Birenboim--

23 STEVEN MOLO: [OVERLAPPING] why would
24 you go through all this process--

25 JUDGE THOMAS AMBRO: --says is what she

1 didn't do was allow you to intervene to make that
2 argument.

3 STEVEN MOLO: Or she didn't address the
4 objection that we made at the time of the motion
5 for preliminary approval. It's the--look,
6 anything could happen, but, you know, experience
7 suggests that if the issue that is this big where
8 the most predominant disease faced by class
9 members gets no relief is raised--

10 JUDGE KENT A. JORDAN: Well, wasn't--

11 STEVEN MOLO: [OVERLAPPING] and their
12 rights have been bargained away. They release any
13 claim they have, then Judge Brody--

14 JUDGE KENT A. JORDAN: Doesn't it--

15 STEVEN MOLO: --is now going to change
16 her mind. I mean--

17 JUDGE KENT A. JORDAN: When you say she
18 "change her mind," I mean the whole point that
19 she hasn't made up her mind.

20 STEVEN MOLO: She has with respect to
21 preliminary approval because certified a class
22 over our--

23 JUDGE KENT A. JORDAN: She--

24 JUDGE THOMAS AMBRO: Well, but what
25 you're saying is that even there, there's a

1 notice that went out that [MADE THE?] intention
2 with - intention with the proposed agreement.

3 STEVEN MOLO: The--I'm sorry?

4 JUDGE THOMAS AMBRO: That's--there are
5 claims or statements made in the notice that may
6 not--that may conflict with what is in the
7 proposed agreement as to who is actually covered,
8 for example, if somebody is diagnosed with CTE at
9 a later time.

10 STEVEN MOLO: The notice is
11 substantially flawed. The notice, notwithstanding
12 what they said. There is mention in the long form
13 notice at one point--

14 JUDGE THOMAS AMBRO: Yeah, but is it--

15 STEVEN MOLO: --about the cutoff date.

16 JUDGE THOMAS AMBRO: --even there, isn't
17 that all the more reason to put it before the
18 district judge who's been in charge of this
19 matter for quite some time? And not just in
20 charge of it, but really actively involved from
21 day one.

22 STEVEN MOLO: I don't disagree that
23 Judge Brody has approached this with, in my
24 judgment, the best of intention, and that she -
25 that we all wanted to get a--we want to see a

1 settlement done.

2 JUDGE KENT A. JORDAN: Not just with--

3 STEVEN MOLO: We just want one that
4 complies with Rule 23, and the sooner that the
5 fix happens, the better.

6 JUDGE KENT A. JORDAN: And best of
7 intentions sort of undersells it. She, as a very
8 experienced trial judge, has been all over this,
9 very careful and by all appearances, working this
10 hard. So there's more than good intentions here.
11 There's a lot of hard work that's going on in the
12 district court.

13 STEVEN MOLO: I don't mean for a moment
14 to disparage what Judge Brody has done, but I do
15 disagree. And it's very clear on the face. It's
16 inconsistent with Dewey. It's inconsistent with
17 G.M. Trucks, that you cannot cut out a huge swath
18 of the class and not even give them
19 representation. Forget about the fact that their
20 rights were bargained away, they never even had
21 anybody at the bargaining table. Neither of the
22 class representatives claimed that they either
23 had CTE or were at risk of getting CTE.

24 JUDGE THOMAS AMBRO: So, if we go
25 forward on November 19, you'll be at that

1 hearing, right?

2 STEVEN MOLO: With bells.

3 JUDGE THOMAS AMBRO: Okay. All right.

4 Thank you very much.

5 STEVEN MOLO: Thank you very much for
6 your time and [UNINTEL PHRASE]--

7 JUDGE THOMAS AMBRO: And thank you to
8 all counsel. Exceptionally well-presented
9 arguments and we'll take the matter under
10 advisement and try to rule as quickly as we can.

11 STEVEN MOLO: Thank you very much.

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10 Attested to by:

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13 Sonya Ledanski Hyde
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1 Gotham Transcription states that the preceding
2 transcript was created by one of its employees
3 using standard electronic transcription equipment
4 and is a true and accurate record of the audio on
5 the provided media to the best of that employee's
6 ability. The media from which we worked was
7 provided to us. We can make no statement as to
8 its authenticity.

9
10 Attested to by:

11
12 
13 Sonya Ledanski Hyde